

BEFORE THE
DEPARTMENT OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RYAN G.,

Claimant,

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

OAH No. L 2006060586

AMENDED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 29, and October 12, 13 and 30, 2006, in Santa Ana, California.

Bruce Bothwell, Esq., Law Offices of Bruce Bothwell, represented claimant, who was not present at the fair hearing.

Mary Kavli, M.F.T., Manager of Fair Hearings and Mediation, Regional Center of Orange County, and Cindy R. Becker, Attorney at Law, Woodruff, Spradlin & Smart, APC, represented the service agency.

The matter was submitted on October 30, 2006.

ISSUES

1. Should the service agency fund up to 40 hours per week of direct applied behavioral analysis (ABA) therapy for claimant, and, in addition, all related supervision and training?

2. Should the service agency reimburse claimant's parents for their out-of-pocket expenses for privately-funded ABA therapy provided to claimant since December 2005?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant Ryan G was born on August 19, 2002. Claimant has a “developmental disability” and is eligible for regional center “services and supports for persons with developmental disabilities” under Welfare and Institutions Code section 4712.¹ Such services and supports are provided through the Regional Center of Orange County (RCOC), the family’s service agency.

2. On June 21, 2006, a state fair hearing request was made on claimant’s behalf. The request asserted that RCOC should fund up to 40 hours per week of direct ABA therapy and, in addition, all related supervision and training provided by Autism Behavior Consultants (ABC), as well as reimbursement for privately-funded ABA therapy.

Ryan’s Condition

3. Ryan was formally diagnosed with autism in December 2004. Ryan’s score on the Childhood Autism Rating Scale was 35, which was in the mild to moderate autistic range. According to an August 2005 evaluation by RCOC consulting pediatric neurologist Peter Himber, Ryan met the diagnostic criteria for Autistic Disorder and overall was in the mildly autistic range.

Chronological Summary

4. In September 2004, Ryan was determined to be eligible for services in RCOC’s Early Start Program. Beginning in October 2004, Ryan received in home, one-on-one direct ABA services through RCOC vendor Coyne & Associates (Coyne), initially for about 12 hours per week, and eventually up to 14 to 16 hours per week. Those services were scheduled to be terminated in August 2005, when Ryan turned three.

5. In May 2005, Ryan was found by the Placentia-Yorba Linda Unified School District (District) to be eligible for special education services. From September to November 2005, Ryan attended a pre-school special day classroom at Tynes Elementary School. During this time, Ryan also received individual and/or small group ABA services, both at home and in school, provided initially (during a two-week transition period) by Coyne and then by a District aide, under Coyne’s supervision. According to Ryan’s mother Debbie G, the District aides, who were supposed to provide 14 hours per week of services, often failed to appear, so that the actual frequency of services provided by District aides ranged “from zero to intermittent at best.”

¹ All statutory references in this Decision are to the Welfare and Institutions Code, unless otherwise noted.

6. On June 28, 2005, Debbie wrote a letter to RCOC, in which she expressed her desire “to discuss of a behavioral problem I am having with Ryan that is significantly impacting our family,” and which “is going to require some additional services from Regional Center.” Debbie explained that “Ryan is not generalizing some of the safety/proper social skills he has learned in his sessions to the outside world.” She went on to describe a number of incidents, and the difficulties Ryan’s behavior was causing the family, noting that “we have truly had some very dangerous things happen because Ryan either can’t focus, process, or understand danger or boundaries no matter what I tell him.” On one occasion, for example, as Debbie was dropping off her daughter at a horse ranch camp, Ryan “broke free of me and began to run toward the walking horses, screaming his head off. I actually had to tackle him to keep him away from the horses’ legs. It was terrifying, embarrassing, and horrible.” Debbie expressed her sense that “we definitely need to expand the program to address this issue now for its own sake.”

7. On July 28, 2005, Ryan’s service coordinator advised Debbie that once a child turns three, direct services from the regional center essentially end, and by law the child’s school district becomes the responsible party. On August 1, 2005, in response to a follow-up question from Debbie, the service coordinator reiterated this representation. Debbie testified that the sense she got from this phone conversation was that the service coordinator was telling her that “We’re done here.”

Vikki Corso, then RCOC Training and Standards Coordinator,² testified that the service coordinator’s statements constituted an inaccurate statement of RCOC policy.

8. In August 2005, Ryan was determined to be eligible for services under the Lanterman Act, based on Dr. Himber’s conclusion that Ryan had a diagnosis of Autism Disorder and was “substantially disabled in the following areas of major life activity: Self-Direction, Receptive and Expressive Language and Self-Care.” Ryan was to continue receiving direct ABA services during a transition period in September and October 2005. In October 2005, Coyne recommended that Ryan continue to receive intensive ABA services, “comprised of 1:1 direct instruction and supported inclusion in a pre-school setting.”

9. In September 2005, Ryan’s parents took Ryan to Dr. Melanie Lenington, a licensed clinical psychologist, who conducted a developmental assessment of Ryan. Debbie testified that she asked Dr. Lenington to evaluate Ryan for two reasons: (a) she was concerned about the adequacy of the District’s assessment; and (b) she wanted to know and understand her son better, so that she could help more effectively.³

10. Several individualized education program (IEP) team meetings were held between June and November 2005. By the latter date, Ryan’s parents and the District had

² Corso later left her employment with RCOC. At the time of the hearing, Corso was a consultant for RCOC.

³ The results of Dr. Lenington’s assessment are described below.

not reached an agreement regarding the appropriate placement and services for Ryan.⁴ Accordingly, in a letter dated November 22, 2005, Ryan's parents notified the District that they had decided to remove Ryan from the District's program.

11. After removing Ryan from the District's program in late November 2005, Ryan's parents enrolled him at The Early Childhood Learning Center (Learning Center), which was affiliated with Temple Beth Tikvah. Ryan attended a regular class with typical peers for about ten hours per week. At about the same time, Ryan's parents secured direct ABA services for Ryan from ABC.⁵ In early April 2006, Ryan's parents moved him from the Learning Center to the Hillsborough Academy preschool, where he attended—and continued to attend at the time of the hearing—three days per week for a total of 10.5 hours per week, accompanied by a one-on-one shadow aide. Ryan initially received approximately 26 hours per week of direct ABA services from ABC, including the hours he spent in school. By the time of the hearing, Ryan was receiving approximately 40 hours per week⁶ of direct ABA services, consisting of both home therapy (29.5 hours) and school shadowing (10.5 hours).⁷ His program also requires 12 hours per month of direct supervision and two to five hours per month of clinical director supervision.

12. At the District's request, another IEP meeting was held on December 9, 2005. The District's offer at this time included ten hours per week of in-home ABA services and 20 hours per week in the Tynes special day class, which was to include "ABA with typical peers" twice weekly, and two hours per week supervision.

Ryan's parents rejected the ten hours per week of in-home ABA services for a number of reasons. Debbie testified that during the preceding months, the aides the District had retained to provide ABA services for Ryan often did not show up, and thus Ryan was not actually getting anywhere near the number of ABA hours the District had prescribed for Ryan. Further, Debbie had by this time already decided to place Ryan with ABC. She did so because it had been her experience that ABA service providers were in high demand and often had waiting lists. When the ABC opening came up, Debbie felt that she had to take it while the opportunity existed. Further, Debbie was concerned about a lack of continuity in

⁴ Several witnesses, including Debbie and the District's Trisha Brady and Gwen Redira, testified in some detail concerning the IEP meetings and process. In light of the conclusion, below, that whether the District offered a FAPE to Ryan need is not appropriately to be decided in this proceeding, this testimony will not be described in this Decision.

⁵ ABC is currently undergoing the vendorization process with RCOC. As of the time of the hearing, the process with regard to ABC was expected to be completed in the near future. ABC is already vendored at certain other regional centers, e.g., Harbor Regional Center.

⁶ The 40 hours per week has been an ideal amount, not always realized. For example, in July and August 2006, due to a family vacation and illness, Ryan received only about 55 and 65 hours direct ABA services respectively for the entire month. Further, the number of ABA hours has been cut back somewhat due to lack of funds.

⁷ Since December 2005, all home ABA services have been provided by ABC. Several months before the time of the hearing, Ryan's parents retained another provider to serve as Ryan's shadow aide at Hillsborough.

treatment for Ryan that would have resulted from two different entities (i.e., ABC and a District provider) providing the same kind of services at the same time. Debbie also felt that the District's proposed goals were inappropriate and she did not want to have an aide for Ryan who would be addressing such goals.

13. On December 10, 2005, Debbie sent Ryan's service coordinator an email, in which she explained that the IEP meeting of the previous day "fell apart and now we have pulled Ryan from the District program. I had been hoping we could reach agreement yesterday but it didn't happen. I am so depressed right now. I am having trouble sleeping." RCOC took no action in response to this email.⁸

14. A final IEP meeting was held on February 9, 2006. At this time, the District offered to place Ryan in a special day class (reverse mainstream setting)⁹ at Linda Vista Elementary School for 20 hours per week, with a trained shadow aide, and in addition six hours per week individualized or small-group¹⁰ ABA instruction and six hours per month program supervision by a District autism specialist. Ryan would have three days per week in a typical preschool setting at Linda Vista. It was the District's opinion that "Linda Vista provides unique supports in that typical peers attend the program but it also provides the expertise of a highly trained special education teacher who can break down the instruction appropriately in order to address Ryan's specialized needs."

15. On February 17, 2006, Debbie wrote a brief letter to Ryan's RCOC service coordinator, enclosing a copy of Dr. Lenington's assessment, and advising that they were unhappy with the District's placement offer and that they had placed Ryan "in a typical preschool with an aide and receiving both ABA and Speech therapy." Debbie requested a meeting with the service coordinator to discuss the situation. RCOC took no action in response to this letter.¹¹

16. On March 17, 2006, Ryan's parents filed a due process hearing complaint against the District. The due process hearing is currently scheduled to take place in February 2007.

⁸ This last finding is made based on Corso's testimony that to her knowledge, RCOC took no action in response to this email. It is also based on the absence of any RCOC email sent in response to Debbie's email, and on the absence of any notations of a response in RCOC's consumer transaction logs.

⁹ A reverse mainstream setting would involve some time spent with typical preschoolers alone, and some time spent with typical and developmentally disabled preschoolers. The program is to be run as close to a typical preschool as possible. A program such as Linda Vista would thus fall somewhere between a typical preschool and a more highly structured special education preschool program such as the one Ryan attended at Tynes.

¹⁰ The IEP meeting notes reflect that the six hours was to be one on one. Debbie testified that the six hours was instead to be in a small group setting. According to Debbie, therefore, the District's February 2006 offer did not include any hours of individualized ABA services, either at home or at school.

¹¹ This last finding is made based on Corso's testimony that she did not recall the service coordinator bringing this matter to her attention. It is also based on the absence of any notation of a response in RCOC's consumer transaction logs. Corso also testified that Debbie's letter was the kind of document she would have expected to be brought to her attention.

17. In a letter dated April 24, 2006, Ryan's parents informed RCOC that they had filed a request for a due process hearing with the District. They also stated that they were themselves funding Ryan's ABA services program with ABC. The letter then stated that "We are now requesting that the Orange County Regional Center fund our son's program until this matter is rectified and reimburse us for the program costs to this point."

The letter also noted that "we are revoking our permission for the Regional Center to share information with our school district without our written permission" and requested "to be made aware of any communications between the District and the Regional Center regarding our son or family." Debbie testified that she not was revoking consent for third parties to communicate about Ryan and more specifically she was not trying to prevent RCOC's ability to get information about Ryan. Instead, she wanted all information to go through her, so that: (a) only accurate information was exchanged; and (b) no irrelevant private information was disclosed.¹²

Corso did not view the April 24 letter as constituting a revocation. She instead understood the letter as stating that if RCOC staff wished to contact the District, Ryan's parents wished to be present. Corso considered the reference to a "revocation" in RCOC's May 30, 2006 letter to be "inaccurate." She also observed that the April 24 letter did not prevent RCOC from acquiring information about Ryan *from* the District.

The record does not reflect that RCOC ever advised Ryan's parents that withdrawal of consent to communicate with the District could result in a denial of services.

Debbie's April 24 letter did not proscribe any communication or collaboration between RCOC and the District. Instead, it expressed Debbie's request that she be informed in advance of any prospective communication, so that Debbie could ensure that only accurate, relevant information was exchanged. The revocation language in Debbie's April 24 letter did not interfere with RCOC's ability to determine Ryan's need for ABA services.

18. On May 23, 2006, in response to Debbie's request that RCOC fund Ryan's ABA program at ABC, RCOC held a planning team meeting. Debbie was not asked to bring to the meeting any ABC reports, nor was she asked to permit RCOC staff to observe the ABC program. At the meeting, RCOC advised Debbie that it could not grant her request for in home ABA services, because "RCOC cannot supplant services that are the responsibility of a generic resource, which in this case is the School District." RCOC did, however, offer "to provide the family with a functional analysis and psychological observations to determine need for behavior services." Ryan's parents were "to complete behavior worksheets and return to Service Coordinator as soon as possible." RCOC stated that it would provide a "Denial Letter for requested services" within a week.

¹² Debbie testified concerning some specific private information that was widely and unnecessarily disseminated. The precise nature of this private information need not be restated in this Decision.

19. In its Denial Letter dated May 30, 2006, RCOC reiterated that that it could not grant the request of Ryan's parents for in-home direct ABA services, because Welfare and Institutions Code section 4648, subdivision (a)(8) proscribed the use of regional center funds "to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." RCOC also relied on section 4659, subdivision (c), "which states that regional center shall identify and pursue all possible sources of funding for consumer receiving regional center services," including, *inter alia*, school districts. The request for reimbursement was denied on the basis of California Code of Regulations, title 17, section 50612, "which states that Regional Center must authorize services in advance of provision of services." The letter "recommend[ed]" that a functional analysis be completed, which "would be provided to address the specific behaviors that you would identify as problematic that occur in your home, toilet training, self care deficits, and non-compliant behavior in the community." The letter also recommended that RCOC be permitted to contact the District "to discuss program concerns and collaboration of services," and to complete home and school observations of Ryan, and that Debbie fill out certain forms.

The letter also noted that RCOC had not been involved in the IEP process, which it claimed "was due to late or no notification regarding scheduled IEP's. Regional Center was unaware of your dissatisfaction with the [District's] program until this request."¹³

20. Ryan's parents never got back to RCOC with regard to its offer to do a functional assessment. Debbie testified that she did not look at the functional assessment offer "in great detail," since direct ABA services had already been "taken off the table" and because of her understanding that the result of the functional assessment would be nothing more than parental training for her, which she did not believe she needed. Debbie was never told that a functional analysis was necessary to determine whether Ryan needed ABA services. For the same reason, Debbie did not fill out the forms that RCOC had provided to her at the May 23, 2006 meeting. She did not feel it was worth it to put Ryan through further evaluations or spending more of her time pursuing those matters.

21. On June 21, 2006, Ryan's parents served the fair hearing request in this matter on RCOC.

22. In a letter dated July 27, 2006, RCOC reiterated some of the matters set forth in its May 30, 2006 letter, and in particular inquired whether Ryan's parents were going to allow RCOC to contact the District and to complete home and school observations for Ryan, and whether they were going to complete certain forms and agree to a functional assessment.¹⁴

¹³ The assertion that RCOC was unaware of Debbie's "dissatisfaction" ignores and is inconsistent with Debbie's December 10, 2005 email and February 17, 2006 letter to the service coordinator, described above. The assertion that RCOC's lack of involvement in the IEP process was because it received "late or no notification" regarding IEP meetings is discussed below.

¹⁴ The July 23 letter used the word "request," whereas the May 23 letter had used the word "recommend."

Functional Assessment

23. RCOC has asserted that a decision with regard to the kinds of services Ryan needs (including ABA services) cannot be made until a functional assessment is completed. A functional assessment examines targeted problem behaviors and is a means of attempting to identify the environmental factors that cause or influence such behaviors. The concept is that a problem behavior cannot be addressed or changed until the “function” of the behavior for the child is understood. Once the antecedent factors are identified, an effective intervention to address the behavior can be developed. A functional assessment may involve interviews of parents, teachers and others, observations of the child in different settings, and carefully-crafted experiments which are conducted to test working hypotheses as to the causes of problem behaviors. The process may go on for an extended period of time. Part of the goal is to note the child’s baseline behaviors, so that there will be a meaningful way to measure progress in different areas from that initial baseline.

24. Suzanne Lowe, RCOC behavior services manager, oversees the provision of all behavioral services for RCOC consumers. She is a board-certified behavior analyst, with over 20 years experience in the field.

Lowe testified that a functional assessment must be administered before behavior services can be provided to a child. She stated that guidelines of the Board of Certified Behavior Analysts require that a functional assessment be performed prior to providing behavioral services to an individual. She acknowledged that not all regional centers follow these guidelines, but RCOC does, and she considers this to constitute best practices. Lowe added that she could not determine the number of hours of behavior services a child needs before a functional assessment is completed. She would also want to take into account what other services a child is receiving, in the home, community and school settings. A functional assessment would determine not only the number of hours to provide, but the specific kinds of services.

25. Vikki Corso testified that a functional assessment would be necessary to address Ryan’s specific problematic behaviors, identified as “toilet training, self care deficits, and non-compliant behaviors in the community.” She added that of the 26 goals identified in ABC’s initial assessment of Ryan, a functional assessment would permit the addressing of at least five of those goals: brushing teeth, eating, and three behavioral problems, i.e., tantrums, elopement, and self-stimulatory behavior.¹⁵

Corso stated that the information contained in two reports prepared by ABC contained some components of a functional assessment, which she believed would have been sufficient to justify initiating services, temporarily at a “minimum” level. She believed that a formal

¹⁵ Corso testified with regard to a number of other goals that would normally be within the regional center’s purview. It was not clear whether it was her view that a functional assessment would be necessary in order to address those other goals.

functional assessment was still necessary, however, because some behavioral assessment information was missing from ABC's reports.

26. Dr. John Cone is a consulting psychologist at RCOC. He is a licensed psychologist, and board-certified behavior analyst. He has been licensed in California since 1991. He has taught at colleges and universities for about 35 years. He has published many articles, and presented numerous papers and workshops. He has engaged in a substantial amount of grant writing. Much of his work has involved behavioral analysis, especially concerning children with developmental disabilities, including autism.

Dr. Cone testified that ABC's initial assessment of Ryan was not a functional assessment. He explained that a functional assessment is performed primarily to address behaviors that challenge an individual's development. To perform such an assessment, one must identify problem behaviors, which ABC did do, but that it is also necessary to provide precise definitions, which ABC did not do. He stated that the basis for the goals identified in ABC's assessment was not "immediately evident" based on Ryan's deficiencies, strengths, and other qualities. He noted as well that the assessment was inconsistent with regard to its analysis of tantrums, at one point quantifying tantrums on a per opportunity basis, and later changing the measurement to the number of tantrums per day.

Dr. Cone testified that if he had been involved in Ryan's case, he would have recommended to RCOC that a functional assessment be conducted. He felt that services for Ryan should be started as soon as possible, and that the functional assessment should be completed toward the end of an initial three-month period. He did not state that ABA services should not have been provided to Ryan until after a functional assessment was completed. He added that ABC's goals for Ryan focused more on building skills than changing behavior. Accordingly, most of the goals identified by ABC could be addressed in the absence of a functional assessment. He also confirmed that the Harbor and San Gabriel regional centers do not typically require a functional assessment for autistic children over the age of three.

27. Dr. Gina Green has a Ph.D. in psychology and is a board-certified behavior analyst. She has conducted research and taught at the university level in the areas of behavior analysis and the developmentally disabled. She has worked with autistic children since her undergraduate days. During the last ten years, her primary focus has been on early intervention for autism. She has engaged in treatment, research, and has published two manuals concerning early intervention for autism, in addition to many other publications. She is currently an advisor to the National Autism Center National Standards Project and is on the boards of advisors for several other autism organizations. She has participated in autism seminars, conferences and professional meetings in the United States and abroad.

Dr. Green testified that a functional assessment need not be performed in order to prescribe ABA services to a young child with autism. A baseline assessment is sufficient to establish a plan of treatment. The ethics code of the Board of Certified Behavior Analysts provides that a functional assessment should be done with regard to problem behavior. However, whether ABA services are appropriate is a separate question. In Ryan's case, only

three of the 26 goals identified in ABC's initial assessment of Ryan (those relating to tantrums, elopement, and self-stimulatory behavior) required a functional assessment.

28. Dr. Melanie Lenington has a Ph.D. in clinical psychology and has been a licensed clinical psychologist since 1994. Eighty percent of Dr. Lenington's practice involves neuropsychological assessments for persons of a wide age range and variety of atypicalities; the remaining twenty percent involves working with family members of individuals with developmental challenges, or who themselves have such challenges. For the past twelve years, 65 percent of Dr. Lenington's patients have been preschool autistic children.

Dr. Lenington testified that the purpose of a functional analysis is to assess problematic behavior, and to understand the antecedents leading to that behavior, and what the child "gains" from the behavior. In Ryan's case, it is important to understand why he has tantrums. In Dr. Lenington's opinion, such an understanding presently exists, so that a functional assessment is not presently necessary. Such an assessment may be needed later, but is not needed now, since there is no unexplained problem behavior.

29. Based on the applicable burden of proof, a functional assessment would be helpful for Ryan, but is not necessary in order for a determination to be made with regard to the provision of direct ABA services to Ryan.¹⁶ Dr. Green and Dr. Lenington both testified that a functional assessment was not necessary. Dr. Cone testified that he would have recommended that a functional assessment be conducted, but only after services had been provided to Ryan for an initial three-month period. He did not state that ABA services should not have been provided to Ryan until after a functional assessment was completed. He acknowledged that most of Ryan's goals related to building skills, which could be addressed in the absence of a functional assessment. Indeed, there was general agreement among all witnesses that the areas for which a functional assessment would be helpful (i.e., Ryan's tantrums, elopement, and self-stimulatory behavior) represented a small proportion of the totality of the goals that had been formulated for Ryan. Additionally, at least two other regional centers do not require a functional assessment before providing ABA services to a young autistic child. Further, though RCOC did recommend that a functional assessment take place, it did not advise Ryan's parents that one was necessary or that a decision with regard to ABA services could not be made in the absence of one. Perhaps most importantly, the evidence reflects that even as to the specific behavioral issues that would be addressed by a functional assessment, Ryan has improved greatly since ABC began to provide services to him.¹⁷

¹⁶ With regard to RCOC's related assertion that Debbie did not complete and return certain forms, the evidence is insufficient to establish that such failure had any impact on RCOC's ability to determine Ryan's need for ABA services.

¹⁷ See testimony of Selena Emond and Debbie, below.

Notification to RCOC Concerning IEP Meetings

30. RCOC has asserted that Ryan's parents failed to notify RCOC in timely fashion of upcoming IEP meetings. However, RCOC documents reflect that RCOC was aware of such meetings as early as the very first one. Ryan's service coordinator apologized for not being able to attend the first IEP meeting due to a cold. In October 2005, Ryan's service coordinator apologized that she could not attend a meeting because "I have another meeting at that time." Corso testified that she did not believe Ryan's parents were responsible for failing to advise RCOC concerning IEP meetings.¹⁸ The short notice provided by Ryan's parents to RCOC was generally the result of short notice being given by the District to Ryan's parents. Based on the applicable burden of proof, Ryan's parents did not fail to notify RCOC of IEP meetings in timely fashion.

ABA Services

31. ABC's Clinical Director Selena Emond has a master's degree in applied behavior analysis and is currently a doctoral candidate in applied developmental psychology at the University of Maryland. She is a board-certified behavior analyst. She has been a research assistant at the Douglas Developmental Disability Center of Rutgers University, and a clinical assistant at the Neurobehavioral Outpatient Clinic at the Kennedy Krieger Institute at Johns Hopkins. She has received clinical training in autism.

Emond testified that she is "extremely" familiar with Ryan. She has seen him about 20 times, and has talked to his case supervisor on a frequent and regular basis.

Ryan was placed with ABC in December 2005, when he was three years, four months old.¹⁹ ABC personnel administered a standardized test as part of its initial assessment, to help gain an overall picture of Ryan's skills levels. Ryan's cognitive skills were "primarily between the 3 and 4 year range with a scatter of skills up to 52 months." His language skills were "primarily between the 2 to 3 year age range." His gross motor skills were in "the 2 to 3 year age range." His fine motor skills were "primarily from the 2 to 3 year age range with a scatter of skills to the 3 and a half year range." His social skills were "primarily between the 3 to 4 year age range with a scatter of skills up to the 4 year and 2 months age range." His self-help skills "ranged from the 2 to 3 year age range with a scatter of skills up to 3 and a half-year age range." He thus had deficits in a number of areas, and these deficits involved more than behavior.

Also as part of ABC's initial assessment of Ryan, goals were formulated in the areas of receptive and expressive language, socialization, play skills, pre-academic and pre-school readiness skills, self-help skills, and amelioration of behavior challenges. The last of these

¹⁸ Corso testified further that the only matter Ryan's parents did not provide to RCOC was the functional assessment.

¹⁹ The matters set forth in this Factual Finding are based both on Emond's testimony and on ABC's initial assessment and progress report dated March 1, 2006 and August 1, 2006 respectively.

consisted of three areas: tantrums, self-stimulatory behavior, and elopement. Several goals for Ryan's parents were also articulated.

ABC's recommended program of treatment for Ryan was "a home-based, one-on-one intensive behavioral intervention program," specifically 30 hours of in-home treatment per week and ten hours of one-to-one shadow in his typical preschool class. Emond noted that at present Ryan is making more progress in the one-on-one environment than at school. She stated that Ryan does not acquire skills as easily as a typical child (though he is good, as compared with other autistic children). Accordingly, he needs ABA intervention in order to acquire those skills.

Emond testified that ABC did not do a "full-blown" functional analysis for Ryan, and that to do so is not standard. She stated that ABC did a "brief" functional analysis, which, according to the research, is "perfectly fine." Based on behavioral concerns expressed by Ryan's parents, ABC conducted an initial three-hour assessment. ABC then collected baseline data for a two-to-three-week period, in an effort to identify antecedent behaviors. ABC analyzed this data, in order to determine what type of intervention would be effective, e.g., to identify replacement behaviors that could help Ryan overcome his problem behaviors.

ABC applied this analysis to three problem behaviors: escape-maintenance tantrum; attention-seeking tantrums; and elopement. Escape-maintenance tantrums involved Ryan's attempt to escape from a demand placed on him with which he did not wish to comply. In December 2005, Ryan engaged in a reported 80 such tantrums per day. By September 2006, the frequency had declined to about 20 per day. Attention-seeking tantrums involved an attempt to get someone's attention. The baseline data for these tantrums was 14 per day. By September 2006, attention-seeking tantrums had been virtually eliminated. The baseline for elopements was about 54 for the month of January 2006; by September, the occurrence of elopements was down to almost none.

Accordingly, with regard to problem behaviors, Ryan's tantrums have decreased in frequency, intensity and duration. His elopements have also substantially decreased.

Emond testified that Ryan has made progress in all goal areas during his treatment with ABC. As of August 2006, and with regard to language and communication, Ryan was deemed to have achieved goals in sequencing, emotion, joint attention/perspective taking, and people identification. He was deemed to have been making progress in receptive instructions, gestures/nonverbal cues, recall, and describing. No improvement was noted in the area of asking questions. With regard to socialization, Ryan was deemed to have achieved the goal of outdoor games. He was found to have made progress in the areas of peer initiation, cooperative play/conflict resolution, and eye contact. With regard to play skills, Ryan was deemed to have achieved goals in tricycle riding and bike riding. He was deemed to have made progress in the areas of independent play and imaginary play. With regard to self-help skills, Ryan was found to have made progress in the areas of brushing teeth, toileting, and eating. With regard to pre-academic and pre-school readiness, Ryan was deemed to have achieved his goal in the areas of coloring, and to have made progress in the

area of cutting. Ryan was deemed not to have improved in safety, money, awareness of rhymes, phonemic awareness, and expressive phonemic.

Emond testified that once a goal is achieved, it may or may not be replaced with another goal in the same area.

As of the time of the hearing, Ryan was receiving 22 to 23 hours per week of direct in-home ABA services. Ryan was also receiving 10.5 hours per week from a non-ABC-affiliated school shadow aide. In Emond's opinion, based on Ryan's current rate of progress, Ryan needs a 30 to 40 hour-per-week program, including ten hours at school with a shadow aide.²⁰ She additionally recommended ten hours supervision and four hours of clinical director consultation per month.

32. Debbie testified that Ryan has done "very, very well" in ABC's program, in conjunction with his typical preschool program.²¹ His language ability has "exploded," as has his motivation. He is very interested in interacting with other children at school. "He's a different kid." He is talking about the things he has learned and is generalizing, i.e., applying lessons in a more general way than the precise context in which he learned them.

33. Dr. Cone reviewed ABC's two reports and the developmental assessment of Dr. Lenington. He did not meet or observe Ryan.

Dr. Cone testified that RCOC's "responsibility" was to provide seven hours per week of ABA services for Ryan. He reached this conclusion based on a statement in ABC's initial assessment that Ryan had been receiving an average of 30 hours per week of ABA. Dr. Cone reduced that 30 hours per week proportionately by: (a) the percentage of Ryan's goals that he had already achieved; and (b) the percentage of remaining goals that would be within the scope of what Dr. Cone considered to be regional center responsibility, as opposed to the responsibility of some other source, such as a school district. He later modified his testimony when it was pointed out to him that ABC was actually recommending not 30 but 40 hours of ABA per week. He also clarified that he did not actually have an opinion with regard to ABC's recommended 40 hours per week. He said that question could not yet be answered because more questions remain. He stated that parental training would also be needed. He also stated, based on the numerous goals that Ryan had already achieved, that Ryan was making excellent progress in the ABC program.

34. Dr. Green testified that she reviewed several IEP reports, the two ABC reports, and Dr. Lenington's assessment, among other documents. She did not meet or observe Ryan. Her general impression was that Ryan learns pretty well, when things are broken down into small components and repeated. If he is given one-on-one services in an intensive way, he

²⁰ Emond testified at one point that Ryan needs a 30-hour-per-week program. At another point, she testified that he needs a 35-hour-per-week program. ABC's written assessment stated that Ryan needs a 40-hour-per-week program.

²¹ As noted above, both began in December 2005.

can continue to improve. Her opinion was based on the records she reviewed as well as the research literature.

Dr. Green testified about a number of studies that have appeared over the past 20 years in peer-review journals. These studies collectively reflect that nearly one half of young autistic children who received intensive ABA services improved dramatically within one to four years (depending on the study), whereas children receiving a substantially lesser amount of ABA services in conjunction with special education classes made little or no improvement. In at least two studies, nearly one half of young children who received 40 hours per week of ABA services were able to participate successfully in regular education classrooms, performing grade-level work, within two to four years. Most of the remaining half of children tested made significant improvement through intensive ABA. Based on these studies, between 45 and 48 percent of mentally retarded autistic children are moved to the normal IQ range after intensive ABA treatment.²² Dr. Green added that the studies show that even as much as 20 hours of ABA per week is ineffective. She thus disagreed with a National Research Council study that recommended a minimum of 25 hours per week of ABA, i.e., she felt that 25 hours per week was too low.

Dr. Green testified that in these studies, most or all of the intensive ABA treatment initially took place at home. Then, as the child developed skills, he was gradually transitioned into the preschool or kindergarten setting, supported by a shadow aide. The child could not be placed in a classroom for purposes of socialization until the child had acquired foundational skills – before then, putting her in the classroom would not help her to become socialized “by osmosis.” According to Dr. Green, Ryan presently has “the rudimentary tools.” The amount of time he is presently in school is “about right for him.” He still needs a lot of one-on-one treatment.

A study commissioned by the New York State Department of Health Early Intervention Program concluded that only intensive ABA was a demonstrably helpful treatment. Other potential treatments were ineffectual, actually harmful, or yielded inclusive results.

Dr. Green testified that to her knowledge, a contrary body of literature does not exist. That is: (a) no studies have found that intensive ABA does not work; and (b) almost no studies have been undertaken with regard to the effectiveness of other treatment methodologies.

In Dr. Green’s opinion, intensive ABA treatment should last a minimum of two years, though for many children, a three to four year program may be required.

Dr. Green expressed the view that the goals ABC identified for Ryan are appropriate for him. They are very comprehensive, address all needs and standard areas of development, such as social skills, communication, and motor skills, and are broken down further within

²² The weekly hours of ABA and the results achieved varied somewhat from study to study.

those broad areas. ABC also identified Ryan's relatively few problem behaviors and appropriate goals to address them.

It is Dr. Green's opinion that 40 hours per week of intensive ABA services is appropriate for Ryan. She believed that Ryan could benefit from more individualized treatment, since he has so far had relatively little intensive intervention. He should continue to receive individualized treatment until he begins to acquire the skills necessary to work in small groups.

35. Dr. Lenington assessed Ryan in September 2005, at the request of Ryan's parents, who sought "specific recommendations to address the issues that do or are likely to challenge Ryan on a daily basis and going forward."²³ She conducted tests, observed Ryan, and interviewed Ryan's mother. She spent eight hours with Ryan over a period of four two-hour appointments. She reviewed several reports for background information.

Dr. Lenington made a number of behavioral observations. Ryan had tantrums, had difficulty maintaining attention to tasks, and he had difficulty "getting the big picture." He did things haphazardly, he'd start over and over, trashing what he had done, he engaged in self-stimulatory behavior. He enjoyed it when Dr. Lenington "entertained" him. He could copy things that she did, but he could not extend them. He repeated back when he did not understand something, instead of asking for an explanation. He used lots of jargon (i.e., sounds without meaning, like those babies make). He was alert to someone interacting with him on a verbal level, but he could not respond. He had difficulty with activities that required him to use his hands well; he did not have good dexterity.

Dr. Lenington administered a number of tests to Ryan. His intelligence was found to be at least average. His scores were "scattered," i.e., he scored higher in some areas and lower other areas than would be expected of a child his age. He "evidenced a pattern of missing easier items and getting more difficult items correct within both the language and cognitive aspects of" a particular test. Language and relating to other persons were the most difficult for him. He posed questions, but was repetitive, and did not necessarily pose correct questions. He could build things, and could imitate strokes. He could not remember motor sequences.

Ryan achieved a Verbal IQ score of 100, which was in the average range, at the mean, and a Performance IQ score of 90, which was in the average range, though below the mean. His various subtest scores were also in the average range, sometimes below the mean, sometimes at the mean, sometimes above the mean. Again, Ryan exhibited scatter, i.e., "patterns of inconsistency reflecting an ability to understand and respond correctly to more difficult items while missing easier items in some instances."

²³ This Factual Finding is based on both the testimony of Dr. Lenington and her September 2005 developmental assessment.

With regard to the Differential Abilities Scales, Ryan's composite score was in the superior range. With regard to a special nonverbal composite, he scored in the more than very superior range, with subtest scores ranging from the 34th to the 99th percentile, representing respectively age equivalencies of two years ten months to six years seven months. The result of the subtest in which Ryan scored in the 99th percentile, which involved *nonverbal* problem solving, "suggests an overall level of cognitive ability in the more than average range, perhaps in the superior range." Dr. Lenington noted, however, that the wide range reflected in Ryan's scores makes it very difficult for him to learn. She added that he would be able to function very well if hindering factors, especially language, could be removed. Other significant hindering factors were dexterity and attention.

With regard to developmental and neuropsychological functioning, Dr. Lenington sought to examine the "underpinnings" of Ryan's deficits, i.e., "to gain further insight into Ryan's specific developmental and functional skills." In this regard, Dr. Lenington focused on the skill domains of relative language, sensorimotor skill, visual spatial skill and memory. Ryan's scores were "all over the board," ranging from the borderline range to the average range just below the mean. Ryan's memory function was found to be in the below average range; Dr. Lenington noted that memory affects language.

With regard to academic skills, Ryan was tested in areas of reading, mathematics, and general knowledge. With regard to reading, Ryan scored at an age equivalence of over five years, suggesting that he will have an early ability to read. With regard to mathematics, Ryan scored at an age equivalence of four years five months.

With regard to adaptive behavior, Ryan's skills were assessed based on an interview of his mother. From his mother's report, Ryan's overall level of adaptive functioning was developed at one year, ten months. Deficits were especially marked in daily living skills, socialization, and communication. These scores were in the mild deficit range. These low scores constitute a significant problem for Ryan in the context of his high intelligence as reflected on other tests.

In sum, Dr. Lenington noted that Ryan's scores reflected substantial scatter, ranging from the fifth to the 99th percentile. Dr. Lenington explained that this degree of scatter has a "huge" effect on Ryan's ability to learn. For example, his poor ability with regard to fine motor skills could make it hard to determine what he has learned, since he might be unable to draw a picture to express what he has learned.

Dr. Lenington agreed that Ryan has Autistic Disorder. In this regard, "Ryan contends with qualitative impairment in social interaction." Despite his "more than average intelligence," he "makes many syntactical and pragmatic errors, uses simple sentences, is easily distracted, and needs external structure to complete tasks." He also "exhibits failure to develop peer relationships appropriate to his developmental and cognitive level" and "lacks social or emotional reciprocity." In addition, he "reveals qualitative impairments in communication with delay in the development of spoken language." He also reveals "restricted, repetitive, and stereotyped patterns of behavior, interest, and activities." Ryan is

thus a child “challenged by social interactions, vulnerability, and sensitivity with a backdrop of core receptive and expressive language difficulties.”

Dr. Lenington’s opinion and recommendation was that Ryan receive 40 hours per week of direct individualized ABA services, with about 30 hours to take place at home, and the other ten in a school environment, and in particular that he placed in a regular school program, with a shadow aide. In addition to her own assessment, Dr. Lenington’s recommendation was based on several factors, including a number of research studies that collectively reflect the substantial benefits of intensive ABA services for young autistic children,²⁴ the fact that Ryan is a very fast learner, and the opinion of Coyne’s Dr. Len Levin that Ryan learned best in a one-on-one environment. Dr. Lenington acknowledged that a National Research Council study has recommended a minimum of 25 hours ABA services per week. Dr. Lenington nonetheless recommended 40 hours per week for Ryan, because of her view that Ryan has the capacity to move ahead well, and needs more intervention at home so that he can get to the level where he can gain the most benefit from a school program. She added that the overall balance between in-home ABA and preschool ABA may change over time. She felt it would be best to let the ABA provider make that decision, in collaboration with Ryan’s school. She also expressed agreement with the goals identified in ABC’s March 2006 initial assessment.

In Dr. Lenington’s opinion, “Without intervention of frequency, duration, and intensity commensurate with his overall level of intelligence, Ryan is likely to exhibit more and more non-compliant and oppositional behavior as he become [sic] frustrated at his inability to function as he perceives (correctly), that is commensurate with his ability.”

36. Based on the applicable burden of proof, 40 hours of direct ABA services per week constitute necessary services for Ryan. This finding is based in particular on the testimony of Dr. Green and Dr. Lenington, and on the research literature they cited. It is also based, to a lesser extent, on Ryan’s on-going treatment provided by ABC, the written evaluations of ABC, and Emond’s oral testimony.²⁵ Witnesses testifying on behalf of RCOC did not directly controvert these witnesses.²⁶ Instead, RCOC witnesses for the most part expressed the view that a final decision with regard to ABA could not be made until after a functional assessment was completed.²⁷ This latter contention has been rejected above.

No finding needs to be made with regard to how the 40 hours per week should be apportioned between the home and school settings. It is appropriate to leave that decision to

²⁴ Dr. Lenington referenced some of the same studies about which Dr. Green testified.

²⁵ Emond’s testimony and ABC’s reports were collectively less precise than the testimony of Dr. Green and Dr. Lenington with regard to the number of hours per week of direct ABA therapy that Ryan needed.

²⁶ Dr. Cone testified that RCOC’s “responsibility” was to provide seven hours per week of ABA services to Ryan, but this was not a recommendation with regard to the total number of hours per week that Ryan needed. Dr. Cone did not have an estimate with regard to how many weekly hours of ABA Ryan needed.

²⁷ Dr. Cone did not explicitly state that a functional assessment was necessary before a decision with regard to ABA treatment could be made.

the ABA provider and the parties which may be responsible for funding those services, i.e., RCOC and the District. Similarly, no finding will be made with regard to the type of school placement (e.g., typical, reverse mainstream) that is appropriate for Ryan. This decision should be deferred until the due process proceeding currently scheduled for February 2007, where the issue can be fully and directly litigated, and where the District will be a represented party.

Based on the applicable burden of proof, ten hours per month of program supervision and four hours per month of clinical director consultation constitute necessary services for Ryan. This finding is based on Emond's uncontroverted recommendation, which is largely corroborated by Coyne's recommendation of four hours per week supervision.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. "The moving party—that is, the party asserting the claim or making the charges—generally has the burden of proof" in administrative proceedings. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365.) No published decision has been found that addresses the applicability of this general principle applies to Lanterman Act fair hearing proceedings. It is concluded by analogy, however, that the party in such proceedings who seeks to change the status quo has the burden of proof.²⁸ In the present proceeding, it is the claimant who seeks to change the level of services. Accordingly, claimant has the burden of proof.

In the absence of any statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code § 115.) "The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.' (BAJI (8th ed.), No. 2.60.)" (1 Witkin, Evidence, *Burden of Proof and Presumptions* § 35 (4th ed 2000).)

Statutory and Regulatory Authority

2. "The Legislature has enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act . . . to provide a 'pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.' (§ 4501.) Such services include locating persons with developmental disabilities (§ 4641); assessing their needs (§§ 4642-4643); and, on an individual basis, selecting and providing services to

²⁸ See also Evidence Code section 500, which provides that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." In this proceeding, it is the consumer who has made the claim for relief.

meet such needs (§§ 4646-4647). The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509, 4685), and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community (§§ 4501, 4750-4751).

* * *

In the Lanterman Act '[the] State of California accepts a responsibility for its developmentally disabled citizens and an obligation to them which it must discharge.' (§ 4501.) In so doing, the Legislature has not only recognized that '[persons] with developmental disabilities have the same legal rights and responsibilities [as those] guaranteed all other individuals by the Federal Constitution and laws and the Constitution and laws of the State of California' (§ 4502), but has also granted them certain statutory rights, including the right to treatment and habilitation services at state expense. (See §§ 4502, 4620, 4646-4648.)

To implement this scheme of statutory rights of developmentally disabled persons and the corresponding obligations of the state toward them, the Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, 'has jurisdiction over the execution of the law relating to the care, custody and treatment of developmentally disabled persons' (§ 4416), while 'regional centers,' operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime' (§ 4420)." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388-390.)

3. Welfare and Institutions Code section 4502 provides in pertinent part:

"Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California. No otherwise qualified person by reason of having a developmental disability shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, which receives public funds.

It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following:

(a) A right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible. Such services shall protect the personal liberty of the individual and shall be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, or supports."

4. Welfare and Institutions Code section 4512 provides in pertinent part:

“As used in this division:

‘(b) Services and supports for persons with developmental disabilities’ means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to . . . behavior training and behavior modification programs. . . .”

5. Welfare and Institutions Code section 4543 provides as follows:

“(a) Because of the vast size, complexity, and diversity of the State of California, the Legislature finds that the planning activities of the State Council on Developmental Disabilities depend upon the direct involvement of local representatives familiar with the structure and operation of services and programs for persons with developmental disabilities. The Legislature further finds that the legal, civil, and service rights of persons with developmental disabilities cannot be adequately guaranteed throughout the state, and the state plan cannot be implemented, unless monitoring responsibility is established on a regional basis through area boards on developmental disabilities.

(b) For administrative purposes and to ensure compliance with federal and state laws, the area boards shall be attached to the state council.”

6. Welfare and Institutions Code section 4548 provides in pertinent part:

“(d) (1) The area board shall have the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of the legal, civil, and service rights of persons who require services or who are receiving services in the area. In carrying out this responsibility, area boards may appoint a representative to assist the person in expressing his or her desires and in making decisions and advocating his or her needs, preferences, and choices, where the person with developmental disabilities has no parent, guardian, or conservator legally authorized to represent him or her and the person has either requested the appointment of a representative or the rights or interests of the person, as determined

by the area board, will not be properly protected or advocated without the appointment of a representative.”

7. Welfare and Institutions Code section 4620 provides in pertinent part:

“(a) It is the intent of the Legislature in enacting this division that the network of regional centers for persons with developmental disabilities and their families be accessible to every family in need of regional center services. It is the further intent of the Legislature that the design and activities of regional centers reflect a strong commitment to the delivery of direct service coordination and that all other operational expenditures of regional centers are necessary to support and enhance the delivery of direct service coordination and services and supports identified in individual program plans.”

8. Welfare and Institution Code section 4640.6 provides in pertinent part:

“(a) In approving regional center contracts, the department shall ensure that regional center staffing patterns demonstrate that direct service coordination are the highest priority.

* * *

(d) For purposes of this section, "service coordinator" means a regional center employee whose primary responsibility includes preparing, implementing, and monitoring consumers' individual program plans, securing and coordinating consumer services and supports, and providing placement and monitoring activities.”

9. Welfare and Institutions Code section 4640.7 provides as follows:

“(a) It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.

(b) Each regional center design shall reflect the maximum cost-effectiveness possible and shall be based on a service coordination model, in which each consumer shall have a designated service coordinator who is responsible for providing or ensuring that needed services and supports are available to the consumer. Regional centers shall examine the differing levels of coordination services needed by consumers and families in order to establish varying caseload ratios within the regional center which will best meet those needs of their consumers.”

10. Welfare and Institutions Code section 4646, subdivision (a) provides as follows:

“It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.”

11. Welfare and Institutions Code section 4647 provides in pertinent part:

“(a) Pursuant to Section 4640.7, service coordination shall include those activities necessary to implement an individual program plan, including, but not limited to . . . securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person's individual program plan; coordination of service and support programs . . . and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.”

12. Welfare and Institutions Code section 4648 provides in pertinent part:

“In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports.

* * *

(8) Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

(b) (1) Advocacy for, and protection of, the civil, legal, and service rights of persons with developmental disabilities as established in this division.

(2) Whenever the advocacy efforts of a regional center to secure or protect the civil, legal, or service rights of any of its consumers prove ineffective, the regional center or the person with developmental disabilities or his or her parents, legal guardian, or other representative may request the area board to initiate action under the provisions defining area board advocacy functions established in this division.”

13. Welfare and Institutions Code section 4651 provides in pertinent part:

“(a) It is the intent of the Legislature that regional centers shall find innovative and economical methods of achieving the objectives contained in individual program plans of persons with developmental disabilities.”

14. Welfare and Institutions Code section 4652 provides as follows:

“A regional center shall investigate every appropriate and economically feasible alternative for care of a developmentally disabled person available within the region. If suitable care cannot be found within the region, services may be obtained outside of the region.”

15. Welfare and Institutions Code section 4659 provides as follows:

“(a) Except as otherwise provided in subdivision (b) or (c), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.

(b) Any revenues collected by a regional center pursuant to this section shall be applied against the cost of services prior to use of regional center funds for those services. This revenue shall not result in a reduction in the regional center's purchase of services budget, except as it relates to federal supplemental security income and the state supplementary program.

(c) This section shall not be construed to impose any additional liability on the parents of children with developmental disabilities, or to restrict eligibility for, or deny services to, any individual who qualifies for regional center services but is unable to pay.

(d) In order to best utilize generic resources, federally funded programs, and private insurance programs for individuals with developmental disabilities, the department and regional centers shall engage in the following activities:

(1) Within existing resources, the department shall provide training to regional centers, no less than once every two years, in the availability and requirements of generic, federally funded and private programs available to persons

with developmental disabilities, including, but not limited to, eligibility requirements, the application process and covered services, and the appeal process.

(2) Regional centers shall disseminate information and training to all service coordinators regarding the availability and requirements of generic, federally funded and private insurance programs on the local level.”

16. Welfare and Institutions Code section 4685 provides in pertinent part:

“(b) It is the intent of the Legislature that regional centers provide or secure family support services that do all of the following:

(1) Respect and support the decision-making authority of the family.

(2) Be flexible and creative in meeting the unique and individual needs of families as they evolve over time.

(3) Recognize and build on family strengths, natural supports, and existing community resources.

(4) Be designed to meet the cultural preferences, values, and lifestyles of families.

(5) Focus on the entire family and promote the inclusion of children with disabilities in all aspects of school and community.”

17. California Code of Regulations, title 17, section 50510 provides in pertinent part:

“Each person with a developmental disability, as defined by this subchapter, is entitled to the same rights, protections, and responsibilities as all other persons under the laws and Constitution of the State of California, and under the laws and the Constitution of the United States. Unless otherwise restricted by law, these rights may be exercised at will by any person with a developmental disability. These rights include, but are not limited to, the following: (a) Access Rights. (1) A right to treatment and habilitation services. Treatment and habilitation services shall foster the developmental potential of the person. Such services shall protect the personal liberty of the individual and shall be provided under conditions which are the least restrictive necessary to achieve the purposes of treatment.”

18. California Code of Regulations, title 17, section 50612 provides in pertinent part:

“(a) A purchase of service authorization shall be obtained from the regional center for all services purchased out of center funds.

(b) The authorization shall be in advance of the provision of service, except as follows:

(1) A retroactive authorization shall be allowed for emergency services if services are rendered by a vendored service provider:

(A) At a time when authorized personnel of the regional center cannot be reached by the service provider either by telephone or in person (e.g., during the night or on weekends or holidays);

(B) Where the service provider, consumer, or the consumer's parent, guardian or conservator, notifies the regional center within five working days following the provision of service; and

(C) Where the regional center determines that the service was necessary and appropriate.”

Analysis

19. The foregoing authority may be summarized in the context of the present proceeding as follows:

(a) The twofold purpose of the Lanterman Act is to prevent or minimize the dislocation of developmentally disabled persons from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons and to lead more independent and productive lives in the community. (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at 388-390.)

(b) Each person with a developmental disability has a statutory right to treatment and rehabilitation services. (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at 389; §§ 4502, 4620, 4646, 4648; Cal. Code Regs., tit. 17, § 50510.)

(c) Regional centers are required to provide developmentally disabled persons with access to the facilities and services best suited to them throughout their lifetime. (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at 388; § 4620).

(d) Regional centers are required to provide for direct service coordination for developmentally disabled persons. Service coordination is to be given a very high priority. (§§ 4620, 4640.6, and 4647.)

(e) Regional centers are required to provide advocacy for and protection of the civil, legal, and service rights of persons with developmental disabilities. (§ 4648.)

(f) The “services” to be provided to developmentally disabled persons include ABA services. (§ 4512, subd. (b).)

20. Ryan needs 40 hours of direct ABA services per week, plus related supervision. However, RCOC makes a number of arguments in support of a contention that, regardless of whether Ryan needs such ABA services, RCOC cannot be ordered in this proceeding to fund them.

a. RCOC contends that it cannot fund educational services that are the responsibility of the District because to do so would, pursuant to Welfare and Institutions Code section 4648, subdivision (a)(8), constitute the unlawful “supplanting” of those service. This contention lacks merit for two basic reasons.

First, no determination has been made²⁹ in the present proceeding that any portion of the 40 hours per week of ABA services Ryan needs pursuant to the state Lanterman Act constitutes educational services required to be provided by the District as part of a free appropriate public education (FAPE) pursuant to the federal Individuals with Disabilities Education ACT (IDEA).³⁰ If such a determination is made in the due process hearing, RCOC may seek reimbursement from the District. While as RCOC notes no explicit statutory authority to file a civil suit to seek such reimbursement exists, such authority seems implicit in section 4659, subdivisions (a) and (b).³¹ Alternatively, a regional center could seek to intervene in a due process hearing, or seek to have the due process and fair hearings consolidated.³² To order a regional center to fund services that are arguably

²⁹ It would be inappropriate to make such a determination in this proceeding, since to do so would invade the province of the pending due process hearing.

³⁰ As the parties both acknowledge, the standard for determining whether a district has offered a FAPE is whether the state provides “personalized instruction with sufficient support services to permit the [handicapped] child to benefit educationally from that instruction.” (*Board of Education v. Rowley* (1982) 458 U.S. 176, 203.) This standard differs substantially from that applicable in Lanterman Act proceedings, in which a developmentally disabled child is entitled to services and supports that “foster the developmental potential of the person and . . . [are] directed toward the achievement of the most independent, productive, and normal lives possible.” (§ 4502, subd. (a).)

³¹ That sections 4548 and 4659, subdivision (d) explicitly give to area boards the authority to “pursue legal, administrative, and other appropriate remedies” and to “initiate action” on behalf of developmentally disabled persons does not imply that regional centers lack such authority.

³² RCOC raises the legitimate concern that a developmentally disabled person might lose the incentive to proceed with a due process hearing after securing all necessary services in the context of a due process hearing. In the present case, however, this is very unlikely to occur, since no determination is made here as to the appropriate educational placement for Ryan. Ryan’s parents and the District still disagree with regard to this issue. Further, the order to be issued in this matter will include a directive to Ryan’s parents to continue to pursue the due process hearing with all reasonable diligence.

also³³ the responsibility of a school district thus would not necessarily result in a supplanting of those services.³⁴

Second, the proscription against the use of regional center funds to supplant the budget of another agency cannot be viewed in isolation. It must instead be construed in light of the overarching responsibility of regional centers to ensure the provision of sufficiently complete services so as to meet the needs of developmentally disabled persons. This fundamental responsibility must remain paramount. The statutory purpose of the Lanterman Act would be undermined by interpreting section 4648, subdivision (a)(8) in such a way as to preclude a regional center from ensuring that a developmentally disabled child is provided with all necessary services.

The Lanterman Act does not clearly or directly delineate a regional center's responsibilities when a school district is alleged to have denied to a regional center client services that may be educational in nature within the scope of the IDEA but are also services within the meaning of the Lanterman Act itself. More specifically, neither section 4648, subdivision (a)(8), upon which RCOC relies, nor section 4659, subdivisions (a) and (b), upon which claimant relies, are unambiguous when applied to the present circumstances. Further, neither interpretation is without practical problems or potential difficulties. If a regional center is ordered to provide services in such a case, this may indeed place a burden on the regional centers to seek reimbursement from a recalcitrant school district.³⁵ However, if a regional center cannot be ordered to provide services in such a case, a greater burden is placed on the parents of a developmentally disabled child. It is appropriate, given the purposes of the Act, to interpret the statute so as to reduce the burden on parents, and to maximize the delivery of necessary services to developmentally disabled children, even if that may mean increasing the burden on the regional centers.

b. RCOC also contends that Ryan's parents did not provide sufficient information to allow RCOC to make a determination that Ryan needed ABA services. This contention is apparently based on several specific matters, including Debbie's unwillingness to have Ryan undergo a functional assessment, to complete and return certain forms to RCOC, and to permit RCOC to exchange information with the District. As found above, the evidence did not establish that any of these matters interfered with a determination of the need for ABA services. Further, RCOC did not advise Debbie that if she refused to do any of these things, her request for ABA services would be jeopardized. Instead, the request was denied for wholly unrelated reasons, i.e., that the provision of ABA services was in this case the responsibility of the District. Under these circumstances, equitable considerations

³³ To the extent there is an overlap of services to be provided to a child pursuant to the Lanterman Act and the IDEA, RCOC's statutory responsibilities to provide necessary services still exists.

³⁴ Based on the same considerations, and accepting *arguendo* RCOC's related contention that a regional center is not the payor of last resort under the Lanterman Act, such an order would not necessarily make a regional center the "payor of last resort."

³⁵ It should not be inferred from this statement that the ALJ has formed any opinion, much less that he is making any finding, with regard to the District's conduct.

preclude a finding that as a matter of law Ryan may be denied needed ABA services on the basis that his parents did not provide sufficient information to RCOC to make a determination of Ryan's need for such services.³⁶

c. RCOC also contends that Ryan's parents failed to exhaust their administrative remedies by not (thus far) prosecuting to conclusion their due process hearing complaint against the District, and by not accepting the District's offer of ten hours of ABA services per week.

RCOC presented no legal authority that adequately supported the former contention. Further, to require parents to go through a potentially costly and lengthy due process hearing while the services their developmentally disabled child needs are held up is directly contrary to the Lanterman Act's purpose.³⁷

RCOC likewise presented no legal authority that adequately supported the latter contention. Further, the ten hours of direct ABA services offered by the District cannot be viewed in isolation, but must instead be considered in the context of its entire offer. When so considered, it is clear that the District's offer differed substantially from the program of services Ryan's parents felt was appropriate, in terms of how the ABA would be allocated between the home and school settings, the type of school placement Ryan would have, and the goals of the ABA program. Accordingly, the District's offer, whether appropriate or not, was fundamentally different than what Ryan's parents sought. For Ryan's parents to have accepted piecemeal the ten hours of direct ABA services would under such circumstances have been meaningless.³⁸

21. Claimant seeks reimbursement for all out-of-pocket expenses incurred with regard to ABA therapy provided by ABC since December 2005. Apparently, no statutory or regulatory prescribes the circumstances when reimbursement is appropriate. That being the case, it is concluded that a decision in this regard must be made based on principles of equity and in such a manner as to further the purposes of the Lanterman Act.

³⁶ RCOC also contends that Debbie failed to provide it information concerning ABC's program. However, as found above, RCOC did not request that Debbie bring any ABC reports with her to the May 23 planning meeting or that RCOC staff be permitted to observe Ryan in the ABC program, nor did RCOC make reference to any such information in its May 23 and July 27 letters.

³⁷ RCOC makes the related contention that if parents of a developmentally disabled child need assistance at a due process hearing, it is, pursuant to section 4648, subdivision (b)(2), area boards rather than regional centers who are the most appropriate entity to initiate proceedings against a district. However, and as noted earlier, that area boards may institute legal proceedings against a district does not imply that regional centers lack such authority, or the related authority to intervene directly in due process hearings.

³⁸ RCOC's related contention that to grant to Ryan direct ABA services where such services are educational in nature and thus the responsibility of the District would result in an unlawful duplication of public resources lacks merit for the same reason, i.e., the services Ryan's parents have requested are quite different from those the District offered. Further, as reflected below in the Order in this proceeding, RCOC's obligation to provide direct ABA services to Ryan will be reduced by whatever ABA hours, if any, are ordered in Ryan's pending due process hearing against the District.

The equities in this case clearly favor Ryan’s parents, and the purposes of the Lanterman Act are best furthered by ordering reimbursement. In December 2005 and in February 2006, Debbie communicated to Ryan’s RCOC service coordinator her serious concerns about the breakdown of the IEP process and the inadequacy of the District’s offer. She also requested a meeting. In neither case did the service coordinator take any action in response to her concerns. Further, the service coordinator did not attend even one IEP meeting. In addition, the service coordinator advised Debbie (erroneously) that once a child turns three, services become the responsibility of the school district and not the regional center.³⁹ These RCOC actions (and inactions) hardly comport with a regional center’s statutory obligation to provide advocacy on behalf of Ryan with respect to his service needs. Finally, if reimbursement is not ordered in cases when a regional center erroneously denies funding for a child’s necessary services and supports, that would give regional centers an incentive not to provide such funding until ordered to do so in a fair hearing proceeding. Such a policy would result in substantial delays in the delivery of needed treatment to developmentally disabled children. For all of these reasons, both equity and the furtherance of the Lanterman Act’s purposes require a reimbursement order in this proceeding.

RCOC argues that a reimbursement order effectively permits parents to determine, unilaterally and apart from the individual program plan (IPP) process, when, from whom and what kind of services are provided to their child, thus eliminating important “checks and balances” in the system and preventing the regional center from finding innovative and economical methods of achieving an IPP’s objectives pursuant to sections 4651 and 4652. However, when parents make a decision to pay for services out of their own pocket absent regional center agreement as to the need for such services, they run the risk that ultimately the regional center’s position will be upheld, in which case reimbursement would not normally be ordered. As with any other equitable question, there may be valid concerns on both sides of the ledger. In the present case, RCOC’s concerns are primarily of an administrative nature. Such concerns are simply less important than meeting Ryan’s established, urgent, and immediate need for intensive direct ABA services.

22. By reason of Factual Findings 1 through 36 and Legal Conclusions 1 through 21, it is concluded that:

a. 40 hours of direct ABA services per week constitute necessary services for Ryan within the meaning of the Lanterman Act and that has been the case since at least December 2005.

b. Ten hours per month of program supervision and four hours per month of clinical director consultation constitute necessary services for Ryan within the meaning of the Lanterman Act.

³⁹ Because of this erroneous information, California Code of Regulations, title 17, section 50612 (relating to retroactive reimbursement) does not apply and the fact that Debbie did not until April 2006 request RCOC to fund the ABA services provided by ABC is not a basis upon which to deny reimbursement.

Accordingly, there is hereby issued the following:

ORDER

1. Claimant's appeal regarding the service agency's obligation to fund ABA 40 hours per week of direct ABA services, ten hours per month of program supervision, and four hours per month of clinical director consultation, and for reimbursement for privately-funded ABA services from December 2005 to the date of this Decision is granted.

2. Claimant shall pursue its due process complaint against the District with reasonable diligence until the resolution thereof. To the extent that claimant fails to do so, the service agency's obligation to fund ABA services as set forth above shall be reduced or eliminated. On or after February 10, 2007, the service agency shall conduct a review as to the status of the due process proceeding. If RCOC has reasonable cause to believe the due process complaint has not been prosecuted diligently as a result of that review, RCOC shall file a request for a due process hearing to modify or eliminate the ongoing funding of ABA services directed herein.

3. Any ABA therapy that is found in the pending due process proceeding to be required as part of Ryan's FAPE shall be prospectively deducted from the hours of ABA services that the service agency is obligated to fund as set forth above.

4. A functional assessment shall be completed within a reasonable period of time after the issuance of this Decision. Claimant shall cooperate with the service agency with regard to the completion of the functional assessment.

IT IS SO ORDERED.

NOTICE

This is the final administrative decision in this matter. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings